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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 576.

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY MEMORANDUM AND MOTION OF PETITIONER.

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The Government's Memorandum in Opposition is founded upon:

First: The finding of the district judge that the testimony concerning the wire tapping was "fantastic." The Government and the Court of Appeals for the Sixth Circuit ignore completely that the finding of "fantastic" was made by a district judge, who, before he had heard the greater part of the testimony, announced "We are not going to try this case twice. And that is my ruling." (JA,[1] p. 15.) This prejudgment of petitioner's motion by the

[1] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

district judge would seem to be a clear denial of justice to petitioner.

Second: The Government then states that the Court of Appeals entered an order (in Appeal No. 17,802) "apparently affirming both the conviction and the denial of the motion for a new trial" on the grounds of newly discovered evidence which had been docketed under No. 18,759 (see Pet. 6a in No. 394, this Term), but the Government does not state the rest of the facts, i.e.:

From the order of the district judge denying petitioner's motion for a new trial, petitioner appealed (No. 18,759 on the docket of the Court of Appeals for the Sixth Circuit). On the same day, July 15, 1968, that petitioner's brief and the joint appendix were filed, the Court of Appeals, as stated by the Government, undertook to affirm the conviction and deny the motion for a new trial by a single entry on the docket in Appeal No. 17,802 and without making any entry on the docket in Appeal No. 18,759. In so doing, the Court of Appeals deprived petitioner of a hearing in Appeal No. 18,759, and, additionally, gave no consideration to the district judge's prejudgment of the motion for a new trial. In fact, it would appear that the action of the Court of Appeals was a prejudgment and a denial of justice to petitioner.

Thereafter, on September 17, 1968, without having afforded petitioner a hearing in Appeal No. 18,759, the Court of Appeals dismissed the appeal as "frivolous and entirely without merit" and entered the order on the docket in No. 18,759. In its opinion (see App. B—petition in this proceeding), the Court of Appeals refers to the direction of the wind in connection with the detection of the odor of fermenting mash by the agents, but ignores completely the fact that the "mash," composed of water, sugar and yeast gave off no odors discernible outside the

attic of petitioner's home. And, in the memoranda in opposition filed herein and in No. 394 (this Term), the Government not only has ignored the fact that there was no odor to be detected irrespective of the direction of the wind, but has also ignored the prejudgment, not only of the district judge, but of the Court of Appeals as well.

Third: The Government then relies on the statement in its Brief in Opposition in No. 394 (p. 5): "Additionally, the Department of Justice * * * has undertaken to determine whether there was any electronic surveillance employed or utilized by the Government in this case; it has found no indication that any such device was employed."

This is a far cry from the action of the Department in *Giordano v. United States*, No. 1070, October Term, 1967, in which the Solicitor General, apparently for no reason whatever, gratuitously announced that electronic surveillance had been employed by government agents and recommended that proceedings against the defendants therein be terminated.

Particularly fascinating becomes this frank divulgence of illegal activities of the agents in *Giordano* when it is realized that at no time during that litigation did any one claim that there had been any electronic surveillance whatever of the defendants. Indeed, it can be said that petitioner, Giordano, was taken completely by surprise at the disclosure made by the Solicitor General because he had never had any reason whatever to even suspect that he had been the object of electronic surveillance. Examination of the transcript of the evidence in *Giordano* reveals that there is nothing in the testimony which even remotely suggests that there had been any electronic surveillance. Said transcript contains ample evidence of the source of the government's first information of the offense and shows that the evidence was legally obtained.

It would seem that there is no apparent motive for the open handed generosity of the Solicitor General in making the admission that there was illegal electronic surveillance in *Giordano*, unless one examines the transcript of post conviction proceedings in the District Court when the judge asked why Giordano (a mere employee of the bankrupt corporation) had been made a defendant (co-conspirator) and the Assistant United States attorney replied that Giordano had been made a defendant because he refused to testify for the government.

The argument in regard to the improper joinder of Giordano as a co-conspirator appears on pp. 23-29 of Giordano's petition, No. 1070, September Term, 1967, from which the motive for the recommendation for dismissal of the case on the grounds of electronic surveillance becomes very clear, indeed. Confronted with the thorny problem created by the conviction of Giordano as a co-conspirator which presented to this Court the picture of the use by the Department of Justice of the conspiracy statute as a crowbar to compel the giving of testimony and which might have resulted in a decision of this Court hampering such use of the conspiracy statute, the Solicitor General admitted electronic surveillance. It now appears that in addition to the representation of the Department of Justice anounced in *Schipani*,[2] there is a different and a new approach for the disclosure of illegal electronic surveillance which, perhaps, may be entitled the "Rule in *Giordano*."

In glaring contrast to *Giordano* is the case at bar where electronic surveillance was the only possible source of the information obtained by the agents. Additionally, the Solicitor General has never in any way denied that there was electronic surveillance of petitioner—he has

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[2] *Schipani v. United States*, 385 U.S. 372.

only said that (The Department) "has found no indication that any such device was employed." [3]

A very substantial reason for the reluctance of the Department to disclose the fact of electronic surveillance is that the tapes of the wiretap disclose that petitioner's brother was responsible for the operation of the still and that petitioner had nothing to do with it.

All the fruit of the wiretap is exculpatory of the petitioner and it has been concealed for this reason. Consequently, it cannot now be revealed without causing possible embarrassment to the agents.

As in No. 394, this Term, the Solicitor General has evaded answering whether there was, or there was not, electronic surveillance of petitioner's home, stating on page 2 of his memorandum in opposition filed herein, "Moreover, as we pointed out in our Brief in Opposition in No. 394 (pp. 4-5), there is not the slightest factual support for the contention that there was governmental electronic surveillance in this case."

It is now clear that the Solicitor General will not answer whether or not there was electronic surveillance of petitioner's home. Therefore, it is respectfully submitted that the following motion *should be granted.*

MOTION.

Petitioner, through his counsel, respectfully moves the Court that a rebuttable presumption be considered to have arisen to the effect that the evidence obtained for the prosecution of petitioner was the result of illegal electronic surveillance which presumption may be rebutted by proof on the part of the government that such *evidence was obtained* by legal means.

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[3] P. 5, Memorandum in Opposition of Solicitor General in No. 394, this Term.

If, by any chance, it should be that the Department of Justice is unable to control its own agents so as to effectively prevent them from using electronic devices for illegal surveillance, it is submitted that the granting of the above motion by this court will be of material assistance to the Department in its efforts to curb the unlawful propensities of the agents who will stand completely exposed if they will have been unable to prove that they obtained the evidence by legal means and who will then realize that the obtaining of evidence by illegal electronic surveillance may as well be terminated.

Petitioner anticipates that the method set forth above for the discipline of the agents will be appreciatively received by the Department and that the Solicitor General will join petitioner in urging this Court to grant the above motion.

CONCLUSION.

It is, therefore, respectfully submitted that petitioner's motion should be granted, if the Department of Justice has no proof to rebut the presumption, then the judgments of the lower courts should be reversed and the case be dismissed; if the Department does have any such evidence, then the case should be remanded to the District Court for the determination of the legality of the same, or, in the alternative, that the petitions for writs of certiorari should be granted.

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